

State of Arizona  
House of Representatives  
Forty-eighth Legislature  
First Regular Session  
2007

# HOUSE BILL 2406

AN ACT

AMENDING SECTIONS 32-1129.01, 32-1129.02 AND 32-1129.06, ARIZONA REVISED STATUTES; AMENDING TITLE 32, CHAPTER 10, ARTICLE 2, ARIZONA REVISED STATUTES, BY ADDING SECTIONS 32-1129.07, 32-1129.08 AND 32-1129.09; RELATING TO CONTRACTORS.

(TEXT OF BILL BEGINS ON NEXT PAGE)

1 Be it enacted by the Legislature of the State of Arizona:

2 Section 1. Section 32-1129.01, Arizona Revised Statutes, is amended to  
3 read:

4 32-1129.01. Progress payments by owner; conditions; interest

5 A. By mutual agreement with a contractor, an owner may make progress  
6 payments on construction contracts of less than sixty days. An owner shall  
7 make progress payments to a contractor on all other construction contracts.  
8 Progress payments shall be made on the basis of a duly certified and approved  
9 billing or estimate of the work performed and the materials supplied during  
10 the preceding thirty day billing cycle, or such other billing cycle as stated  
11 in the construction contract. If billings or estimates are to be submitted  
12 in other than thirty day billing cycles, the construction contract and each  
13 page of the plans, including bid plans and construction plans, shall  
14 specifically identify such other billing cycle in a clear and conspicuous  
15 manner as prescribed in subsection B. Except as provided in subsection C,  
16 the owner shall make progress payments to the contractor within seven days  
17 after the date the billing or estimate is certified and approved pursuant to  
18 subsection D.

19 B. A construction contract may provide for a billing cycle other than  
20 a thirty day billing cycle if the construction contract specifically sets  
21 forth such other billing cycle and either of the following applies:

22 1. The following legend or substantially similar language setting  
23 forth the other billing cycle appears in clear and conspicuous type on each  
24 page of the plans, including bid plans and construction plans:

25 Notice of Alternate Billing Cycle

26 This contract allows the owner to require the submission  
27 of billings or estimates in billing cycles other than thirty  
28 days. Billings or estimates for this contract shall be  
29 submitted as follows:

30 \_\_\_\_\_  
31 \_\_\_\_\_  
32 \_\_\_\_\_

33 2. The following legend or substantially similar language setting  
34 forth the other billing cycle appears in clear and conspicuous type on each  
35 page of the plans, including bid plans and construction plans:

36 Notice of Alternate Billing Cycle

37 This contract allows the owner to require the submission  
38 of billings or estimates in billing cycles other than thirty  
39 days. A written description of such other billing cycle  
40 applicable to the project is available from the owner or the  
41 owner's designated agent at (telephone number or address, or  
42 both), and the owner or its designated agent shall provide this  
43 written description on request.

1 C. An owner may make progress payments later than seven days after the  
2 date the billing or estimate is certified and approved if both:

3 1. The construction contract in a clear and conspicuous manner  
4 specifically provides for a later payment defined by a specified number of  
5 days after certification and approval.

6 2. The following legend or substantially similar language setting  
7 forth the specified number of days appears in clear and conspicuous type on  
8 each page of the plans, including bid plans and construction plans:

9 Notice of Extended Payment Provision

10 This contract allows the owner to make payment within \_\_\_\_  
11 days after certification and approval of billings and estimates.

12 D. A billing or estimate shall be deemed approved and certified  
13 fourteen days after the owner receives the billing or estimate, unless before  
14 that time the owner or the owner's agent prepares and issues a written  
15 statement detailing those items in the billing or estimate that are not  
16 approved and certified. An owner may decline to approve and certify a  
17 billing or estimate or portion of a billing or estimate for unsatisfactory  
18 job progress, defective construction work or materials not remedied, disputed  
19 work or materials, failure to comply with other material provisions of the  
20 construction contract, third party claims filed or reasonable evidence that a  
21 claim will be filed, failure of the contractor or a subcontractor to make  
22 timely payments for labor, equipment and materials, damage to the owner, ~~OR~~  
23 reasonable evidence that the construction contract cannot be completed for  
24 the unpaid balance of the construction contract sum ~~or a reasonable amount~~  
25 ~~for retention~~. The owner is deemed to have received the billing or estimate  
26 when the billing or estimate is submitted to any person designated by the  
27 owner for the receipt of these submissions or for review or approval of the  
28 billing or estimate.

29 E. An owner may withhold from a progress payment only an amount that  
30 is sufficient to pay the direct expenses the owner reasonably expects to  
31 incur to correct any items set forth in writing pursuant to subsection D.

32 F. An owner may extend the period within which the billing or estimate  
33 is certified and approved if both:

34 1. The construction contract in a clear and conspicuous manner  
35 specifically provides for an extended time period within which a billing or  
36 estimate shall be certified and approved defined by a specified number of  
37 days after the owner has received the billing or estimate.

38 2. The following legend or substantially similar language, setting  
39 forth the specified number of days, appears in clear and conspicuous type on  
40 each page of the plans, including bid plans and construction plans:

41 Notice of Extended Certification and  
42 Approval Period Provision

43 This contract allows the owner to certify and approve  
44 billings and estimates within \_\_\_\_ days after the billings and  
45 estimates are received from the contractor.

1           G. After the effective date of a construction contract, an owner and  
2 contractor may change the number of specified days after certification and  
3 approval for the owner to make payment to the contractor or within which a  
4 billing or estimate must be certified and approved. Any contractor or  
5 subcontractor that does not provide written consent to the change will  
6 continue to be paid as previously agreed.

7           H. When a contractor completes and an owner approves and certifies all  
8 work under a construction contract, the owner shall make payment in full on  
9 the construction contract within seven days. When a contractor completes and  
10 an owner approves and certifies all work under a portion of a construction  
11 contract for which the contract states a separate price, the owner shall make  
12 payment in full on that portion of the construction contract within seven  
13 days. On projects that require a federal agency's final approval or  
14 certification, the owner shall make payment in full on the construction  
15 contract within seven days of the federal agency's final approval or  
16 certification.

17           I. Payment shall not be required pursuant to this section unless the  
18 contractor provides the owner with a billing or estimate for the work  
19 performed or the material supplied in accordance with the terms of the  
20 construction contract between the parties.

21           J. A construction contract shall not alter the rights of any  
22 contractor, subcontractor or material supplier to receive prompt and timely  
23 progress payments as provided under this article.

24           K. If an owner or a third party designated by an owner as the person  
25 responsible for making progress payments on a construction contract does not  
26 make a timely payment pursuant to this section, the owner shall pay the  
27 contractor interest at the rate of one and one-half per cent a month or  
28 fraction of a month on the unpaid balance, or at a higher rate as the parties  
29 to the construction contract agree.

30           L. On the written request of a subcontractor, the owner shall notify  
31 the subcontractor within five days after the issuance of a progress payment  
32 to the contractor. On the written request of a subcontractor, the owner  
33 shall notify the subcontractor within five days after the owner makes the  
34 final payment to the contractor on the construction contract.

35           M. In any action or arbitration brought to collect payments or  
36 interest pursuant to this section, the successful party shall be awarded  
37 costs and attorney fees in a reasonable amount.

38           N. If the owner and contractor are a single entity, that entity shall  
39 pay its subcontractors or material suppliers within fourteen days after the  
40 billing or estimate is certified and approved unless the deadlines for  
41 approval and certification or for payment have been modified pursuant to  
42 subsection C or F.

1           Sec. 2. Section 32-1129.02, Arizona Revised Statutes, is amended to  
2 read:

3           32-1129.02. Performance and payment by contractor,  
4           subcontractor or material supplier; conditions:  
5           interest

6           A. Notwithstanding the other provisions of this section, performance  
7 by a contractor, subcontractor or material supplier in accordance with the  
8 provisions of a construction contract entitles the contractor, subcontractor  
9 or material supplier to payment from the party with whom the contractor,  
10 subcontractor or material supplier contracts.

11           B. If a subcontractor or material supplier has performed in accordance  
12 with the provisions of a construction contract, the contractor shall pay to  
13 its subcontractors or material suppliers and each subcontractor shall pay to  
14 its subcontractors or material suppliers, within seven days of receipt by the  
15 contractor or subcontractor of each progress payment or final payment, the  
16 full amount received for such subcontractor's work and materials supplied  
17 based on work completed or materials supplied under the subcontract. Payment  
18 shall not be required pursuant to this subsection unless the subcontractor or  
19 material supplier provides to the contractor or subcontractor a billing or  
20 invoice for the work performed or material supplied in compliance with the  
21 terms of the contract between the parties. Each subcontractor or material  
22 supplier shall provide a waiver of any mechanic's or materialman's lien  
23 conditioned upon payment for the work completed or material supplied. The  
24 contractor or subcontractor may require that such conditional waivers of lien  
25 be notarized. Any diversion by the contractor or subcontractor of payments  
26 received for work performed pursuant to a contract, or failure to reasonably  
27 account for the application or use of such payments, constitutes grounds for  
28 disciplinary action by the registrar of contractors. Violations of this  
29 section shall be grounds for suspension or revocation of a license or other  
30 disciplinary action by the registrar pursuant to section 32-1154, subsections  
31 B, C and D. The subcontractor or material supplier may notify the registrar  
32 of contractors and the owner in writing of any payment less than the amount  
33 or percentage approved for the class or item of work as set forth in this  
34 section.

35           C. Nothing in this section prevents the contractor or subcontractor,  
36 at the time of application or certification to the owner or contractor, from  
37 withholding such application or certification to the owner or contractor for  
38 payment to the subcontractor or material supplier for unsatisfactory job  
39 progress, defective construction work or ~~material~~ MATERIALS not remedied,  
40 disputed work, failure to comply with other material provisions of the  
41 construction contract, third party claims filed or reasonable evidence that a  
42 claim will be filed, failure of the subcontractor to make timely payments for  
43 labor, equipment and materials, damage to a contractor or another  
44 subcontractor or material supplier, ~~OR~~ OR reasonable evidence that the  
45 subcontract cannot be completed for the unpaid balance of the subcontract sum

1 ~~or a reasonable amount for retention that does not exceed the actual~~  
2 ~~percentage retained by the owner.~~

3 D. If a periodic or final payment to a subcontractor or material  
4 supplier is delayed by more than seven days after receipt of periodic or  
5 final payment by the contractor or subcontractor, the contractor or  
6 subcontractor shall pay its subcontractor or material supplier interest,  
7 except for periods of time during which payment is withheld pursuant to  
8 subsection C of this section, beginning on the eighth day, at the rate of one  
9 and one-half per cent per month or a fraction of a month on the unpaid  
10 balance or at such higher rate as the parties agree.

11 E. Any licensed contractor, licensed subcontractor or material  
12 supplier who files a complaint with the registrar of contractors under this  
13 section shall be required to post a surety bond or cash deposit of five  
14 hundred dollars or one-half of the amount due, whichever is less, with the  
15 registrar to secure the payment of claims under this section. If the  
16 complaint is determined by the registrar to be without merit and frivolous,  
17 the registrar shall order the person who filed the complaint to pay one-half  
18 of the amount of the required surety bond or cash deposit to the respondent  
19 and one-half to the registrar for deposit into the state general fund. If no  
20 claim may be made under this section against the surety bond or cash deposit,  
21 the surety bond or cash deposit shall be returned to the complainant. The  
22 surety bond or cash deposit shall be in the name of the licensee or material  
23 supplier who files the complaint and shall be subject to claims by the  
24 registrar of contractors and the respondent licensee as provided in this  
25 section. The surety bond or cash deposit shall be conditioned upon and  
26 provide for payment upon the presentation of a certified copy of the order of  
27 the registrar and a certification by the complainant of nonpayment within  
28 thirty days after the order becomes final. The surety bond shall be executed  
29 by the complainant as principal with a corporation duly authorized to  
30 transact surety business in this state. Evidence of the surety bond shall be  
31 submitted to the registrar in a form acceptable to the registrar. The cash  
32 deposit shall be deposited, pursuant to sections 35-146 and 35-147, by the  
33 registrar in the contractors prompt pay complaint fund and shall be held for  
34 the payment of claims.

35 F. In any action or arbitration brought to collect payments or  
36 interest pursuant to this section, the successful party shall be awarded  
37 costs and attorney fees in a reasonable amount.

38 Sec. 3. Section 32-1129.06, Arizona Revised Statutes, is amended to  
39 read:

40 32-1129.06. Applicability to state and political subdivisions

41 Sections 32-1129.01, 32-1129.02, 32-1129.04, ~~and~~ 32-1129.05,  
42 32-1129.07, 32-1129.08 AND 32-1129.09 do not apply to this state or political  
43 subdivisions of this state.

1           Sec. 4. Title 32, chapter 10, article 2, Arizona Revised Statutes, is  
2 amended by adding sections 32-1129.07, 32-1129.08 and 32-1129.09, to read:

3           32-1129.07. Commercial projects; retention

4           IF RETENTION IS HELD IN A CONTRACTED COMMERCIAL PROJECT, AN OWNER SHALL  
5 RETAIN ONLY NOT TO EXCEED TEN PER CENT OF THE CONTRACT AMOUNT. AFTER  
6 COMPLETION OF EACH SEPARATE COMMERCIAL BUILDING OR OTHER PHASE OF THE  
7 CONTRACT, THE RETENTION MONIES SHALL BE RELEASED ON A LINE ITEM BASIS.

8           32-1129.08. Commercial construction contracts; payments to  
9           contractors and subcontractors; retention;  
10           substitute security; applicability

11           A. IF AN OWNER OR A FINANCIER OF A CONSTRUCTION PROJECT, SUCH AS A  
12 FINANCIAL INSTITUTION AS DEFINED IN SECTION 6-101, REQUIRES RETENTION OR  
13 ANOTHER FORM OF SECURITY FOR A COMMERCIAL CONSTRUCTION CONTRACT, ALL OF THE  
14 FOLLOWING APPLY:

15           1. NOT TO EXCEED TEN PER CENT OF ALL MONIES OWED BY THE OWNER TO THE  
16 CONTRACTOR OR A SUBCONTRACTOR MAY BE RETAINED BY THE FINANCIER OR OWNER TO BE  
17 PAID TO THE CONTRACTOR OR SUBCONTRACTOR WITHIN FOURTEEN DAYS AFTER COMPLETION  
18 OR FILING NOTICE OF COMPLETION OF THE CONTRACT. RETENTION OF PAYMENTS BY A  
19 FINANCIER OR AN OWNER FOR MORE THAN FOURTEEN DAYS AFTER FINAL COMPLETION AND  
20 ACCEPTANCE REQUIRES A SPECIFIC WRITTEN FINDING BY THE FINANCIER OR OWNER OF  
21 THE REASONS JUSTIFYING THE DELAY IN PAYMENT. AFTER FOURTEEN DAYS, NO  
22 FINANCIER OR OWNER MAY RETAIN ANY MONIES THAT ARE IN EXCESS OF THE AMOUNT  
23 NECESSARY TO PAY THE EXPENSES THE FINANCIER OR OWNER REASONABLY EXPECTS TO  
24 INCUR IN ORDER TO PAY OR DISCHARGE THE EXPENSES DETERMINED BY THE FINANCIER  
25 OR OWNER IN THE FINDING JUSTIFYING THE RETENTION OF MONIES. IF AN OWNER OR  
26 FINANCIER DOES NOT RELEASE THE RETAINED MONIES AS SPECIFIED IN THIS SECTION,  
27 THE OWNER OR FINANCIER SHALL PAY THE CONTRACTOR OR SUBCONTRACTOR OR BOTH THE  
28 CONTRACTOR AND SUBCONTRACTOR INTEREST AT THE RATE OF ONE AND ONE-HALF PER  
29 CENT EACH MONTH OR FRACTION OF A MONTH ON THE UNPAID BALANCE OR AT A HIGHER  
30 RATE AS THE PARTIES TO THE CONSTRUCTION CONTRACT AGREE. IN ANY ACTION OR  
31 ARBITRATION BROUGHT TO COLLECT PAYMENTS OR INTEREST PURSUANT TO THIS SECTION,  
32 THE SUCCESSFUL PARTY SHALL BE AWARDED REASONABLE COSTS AND ATTORNEYS FEES.

33           2. IN LIEU OF THE RETENTION PROVIDED IN PARAGRAPH 1, A CONTRACTOR OR  
34 SUBCONTRACTOR OR BOTH THE CONTRACTOR AND SUBCONTRACTOR MAY ESTABLISH A  
35 SEPARATE ACCOUNT WITH A FINANCIAL INSTITUTION AS DEFINED IN SECTION 6-101  
36 THAT IS INSURED BY THE FEDERAL DEPOSIT INSURANCE CORPORATION AND IN WHICH THE  
37 OWNER SHALL DEPOSIT RETENTION MONIES OWED BY THE OWNER TO THE CONTRACTOR OR  
38 SUBCONTRACTOR OR BOTH THE CONTRACTOR AND SUBCONTRACTOR AT EACH BILLING CYCLE.  
39 THE FINANCIER, OWNER AND CONTRACTOR MAY PLACE LIENS ON THE ACCOUNT. THE  
40 CONTRACTOR OR SUBCONTRACTOR OR BOTH THE CONTRACTOR AND SUBCONTRACTOR IS  
41 ENTITLED TO RECEIVE ALL INTEREST OR INCOME EARNED BY THE SEPARATE ACCOUNT AS  
42 IT ACCRUES, AND RETAINED MONIES SHALL BE RELEASED TO THE CONTRACTOR OR  
43 SUBCONTRACTOR OR BOTH THE CONTRACTOR AND SUBCONTRACTOR BY THE FINANCIER OR  
44 OWNER WITHIN FOURTEEN DAYS AFTER FINAL COMPLETION AND ACCEPTANCE OF ALL  
45 MATERIAL, EQUIPMENT AND WORK COVERED BY THE CONTRACT IF THE CONTRACTOR OR  
46 SUBCONTRACTOR OR BOTH THE CONTRACTOR AND SUBCONTRACTOR HAS FURNISHED THE

1 FINANCIER OR OWNER SATISFACTORY LIEN RELEASES FOR ALL LABOR AND MATERIAL  
2 BILLED AND WAIVERS OF LIENS FROM EACH PERSON HOLDING A CLAIM AGAINST THE  
3 WORK.

4 3. AT THE OPTION OF THE SUBCONTRACTOR AND IN LIEU OF THE RETENTION  
5 PROVIDED IN THIS SECTION, THE FINANCIER, OWNER OR CONTRACTOR SHALL ACCEPT IN  
6 WRITING AS A SUBSTITUTE ANY OF THE FOLLOWING:

7 (a) AN ASSIGNMENT OF TIME CERTIFICATES OF DEPOSIT OF BANKS LICENSED BY  
8 THIS STATE, SECURITIES OF OR GUARANTEED BY THE UNITED STATES OF AMERICA OR  
9 SECURITIES OF THIS STATE, IN AN AMOUNT EQUAL TO THE RETAINED MONIES OF THE  
10 CONTRACT.

11 (b) A PERFORMANCE BOND.

12 (c) AN INVESTMENT CERTIFICATE OR SHARE ACCOUNT THAT IS ASSIGNED TO  
13 BOTH PARTIES AND THAT IS ISSUED BY A FEDERALLY INSURED FINANCIAL INSTITUTION.

14 (d) ANY OTHER FORM OF SECURITY AGREEABLE TO THE PARTIES IN AN AMOUNT  
15 EQUAL TO THE AMOUNT OF RETENTION PROVIDED FOR BY THE CONSTRUCTION CONTRACT.

16 (e) A LETTER OF CREDIT.

17 4. IF THE FINANCIER, OWNER OR CONTRACTOR ACCEPTS SUBSTITUTE SECURITY  
18 AS DESCRIBED IN PARAGRAPH 3 FOR THE RETENTION:

19 (a) THE FINANCIER, OWNER AND CONTRACTOR MAY PLACE LIENS ON THE  
20 ALTERNATE FORM OF SECURITY.

21 (b) THE CONTRACTOR OR SUBCONTRACTOR OR BOTH THE CONTRACTOR AND  
22 SUBCONTRACTOR IS ENTITLED TO RECEIVE ALL INTEREST OR INCOME EARNED BY THAT  
23 SECURITY AS IT ACCRUES AND THE SECURITY IN LIEU OF RETENTION SHALL BE  
24 RETURNED TO THE CONTRACTOR OR SUBCONTRACTOR OR BOTH THE CONTRACTOR AND  
25 SUBCONTRACTOR BY THE FINANCIER OR OWNER WITHIN FOURTEEN DAYS AFTER FINAL  
26 COMPLETION AND ACCEPTANCE OF ALL MATERIAL, EQUIPMENT AND WORK COVERED BY THE  
27 CONTRACT IF THE CONTRACTOR OR SUBCONTRACTOR OR BOTH THE CONTRACTOR AND  
28 SUBCONTRACTOR HAS FURNISHED THE FINANCIER OR OWNER SATISFACTORY LIEN RELEASES  
29 FOR ALL LABOR AND MATERIAL BILLED AND WAIVERS OF LIENS FROM EACH PERSON  
30 HOLDING A CLAIM AGAINST THE WORK.

31 5. IF A SUBCONTRACTOR CHOOSES A SUBSTITUTE SECURITY AS DESCRIBED IN  
32 PARAGRAPH 3, THE SUBCONTRACTOR IS NOT REQUIRED TO BEGIN WORK UNDER THE  
33 CONTRACT UNLESS THE FINANCIER, OWNER OR CONTRACTOR ACCEPTS THE SUBSTITUTE  
34 SECURITY IN WRITING.

35 B. THIS SECTION DOES NOT APPLY TO A REMODELING CONSTRUCTION CONTRACT  
36 FOR AN INDIVIDUALLY-OWNED RESIDENTIAL UNIT IN A MULTIUNIT DWELLING.

37 C. THIS SECTION DOES NOT APPLY TO TOTAL PROJECT COSTS OF FIVE MILLION  
38 DOLLARS OR LESS EXCLUSIVE OF LAND ACQUISITION COSTS.

39 32-1129.09. Release of retention monies; payment to  
40 subcontractors

41 IF A FINANCIER OR AN OWNER REQUIRES RETENTION FOR A COMMERCIAL  
42 CONSTRUCTION CONTRACT AND RELEASES THE RETAINED MONIES, THE CONTRACTOR SHALL  
43 PAY THE SUBCONTRACTORS IN COMPLIANCE WITH THIS ARTICLE.

44 Sec. 5. Effective date

45 This act is effective from and after December 31, 2007.